Supreme Court, U.S.
FILED
OCT 24 2006
OFFICE OF THE CLERK

No: 06-584

IN THE

Supreme Court of the United States

LAWRENCE D. MURRAY,

Petitioner,

vs.

MICHELLE FERREIRA,

Respondent.

On Petition for Writ of Certiorari
To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

Lawrence D. Murray
In the Proper Person
1781 Union Street
San Francisco, CA 94123
Phone: 415/673-0555
Fax: 415/928-4084

QUESTIONS PRESENTED

I. **Was Petitioner Father Denied His Constitutional Procedural Due Process Rights When the California Appellate Courts Dismissed His Appeal Regarding Custody and Sanctions Orders For Non Payment of Monetary Sanctions, Which Were the Very Subject of the Appeal?**

II. **Was Petitioner Father Denied His Constitutional Procedural Due Process Rights Prior To and During Trial and Post-Trial When the Court and Court Advisors Refused to Hear Evidence and Dissuaded Him From Having His Custody and Constitutional Issues Heard At Trial?**

III. **Were Petitioner's Substantive Due Process Rights Violated By the Courts Failure to Account for the Liberty Interests Being Deprived in the Upbringing of His Child and In Effect Chilled Petitioner's Exercise of His Right to Seek Fair Judicial Determination of Those Rights By Imposing Sanctions and Drastic Child Support and Custody Orders Following Such a Contest?**

IV. **Were the Actions of the Court and Court Advisors a Violation of Petitioner's Right to Equal Protection of the Laws (Based on Unconstitutional Gender Bias) When Petitioner Was Denied Custody and Sanctioned For Seeking Full Trial on the Merits?**

LIST OF PARTIES

All of the interested parties below are listed in the caption.
Michelle Ferreira and Lawrence Murray.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vii

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

PETITION FOR WRIT OF CERTIORARI 9

STAGE OF PROCEEDINGS WHEN FEDERAL QUESTION WAS RAISED 9

1. Father Raised the Issues of Substantive And Procedural Due Process Rights And Equal Protection Under The Law Being Violated Prior To And During Trial 9

2. Petitioner Intended To Address The Constitutional Violations On Appeal But Was Not Allowed To Proceed On The Merits 9

3. In Petition For Review To The California State Supreme Court Additional Constitutional Issues Were Raised 10

REASONS FOR ALLOWANCE OF THE WRIT 11

I. Petitioner Was Denied His Constitutional Procedural Due Process Rights 11

A. The California Appeals Courts Denied Petitioner's Due Process Rights Where It Dismissed His Appeal On Custody and Sanctions For Non Payment of Monetary Sanctions, the Very Subject of the Appeal 11

B. Certiorari Should Be Granted On The Ground That The Decision Of Court Of Appeal Has Deprived Appellant Of Equal Protection Of The Procedural Laws 16

C. Petitioner Was Denied Procedural Due Process From Early On In the Family Law Proceedings Through the Trial and Post-trial 18

1. Prior to Trial, Petitioner Was Denied Due Process Rights By The Court and Court Services 18

2. During Trial, Petitioner Was Denied Procedural Due Process Rights 19

3. Post-Trial Awards of Sanctions and Support Against Petitioner Denied Petitioner Father His Due Process Rights 21

II. Petitioner's Substantive Due Process Rights Were Violated By the Courts Failure to Account for The Liberty Interests Being Deprived 22

A. Petitioner's Constitutional Right To Participate In The Upbringing Of His Son Was Violated 22

B. Natural Parents Have Certain Liberty Interests In the Care of Their Children That Should Not Be Deprived Without Due Process 23

1. Petitioner Has Had His Constitutional Right To Participate In His Child's Upbringing Violated In The Manner In Which Decisions Were Made Prior To Trial 25

III. The Father Was Denied Equal Protection of the Laws Pertaining to a Fundamental Right of Parenting and Involving Gender Classification 26

CONCLUSION 29

TABLE OF AUTHORITIES

FEDERAL CASES

Boddie v. Connecticut 401 U.S. 371, 376 (1971) 19

Caban v. Mohammed 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979) 27

Meyer v. State of Nebraska (1923) 262 US 390, 399, 401 24

Pierce v. Society of Sisters (1925) 268 U.S. 510, 534-535 24

Prince v. Massachusetts (1944), 321 U.S. 158,166) 25

Quilloin v. Walcott (1978), 434 U.S. 246, 255 25

Santosky v. Kramer (1982), 455 U.S. 745, 753 1, 25

Stanley v. Illinois, 405 U.S. 645 (1972) 19, 23, 25

Troxel v. Granville 120 S. Ct. 2054 (U.S. 2000) 23, 24, 25

Wisconsin v. Yoder (1972), 406 U.S. 205, 232 25

STATE CASES

Alioto Fish Co., Ltd. v. Alioto (1994) 27 Cal.App.4th 1669) 12

Blakeway v. Texas Business Investments Co. 12 Ariz. App. 390, 470 P.2d 710 (Div. 1 1970) 13

California Assn. of Retail Tobacconists v. State of California 109 Cal. App. 4th 792, 841-2. (Cal. Ct. App. 2003) 17

In re Marriage of Whealon, 53 Cal. App. 4th 132 29

In re Sohler (1994) 29 Cal. App. 4th 637, 639 29

Krog v. Krog (1948) 32 Cal.2d 812 12

Lammers v Superior Court
(2000) 83 Cal App 4th 1309, 1324-25 14

Marriage of Thompson
(1979) 96 Cal App 3d 621, 625 17

Moss v. Superior Ct. 17 Cal. 4th 396, 426 12

State ex rel. Watts v. Watts
77 Misc. 2d 178 (N.Y. Misc. 1973) 27

Stone v. Bach (1978) 80 Cal.App.3d 442, 444 12

TMS, Inc. v. Aihara
(1999) 71 Cal.App.4th 377, 379 12

FEDERAL CONSTITUTION & STATUTES

28 U.S.C. § 1257 1

U. S. Constitution, Amendment V 2, 16, 24

U. S. Constitution, Amendment XIV 14, 16, 24

U. S. Constitution, Amendment XIV, Section 1 2

CALIFORNIA CONSTITUTION &STATUES

California Const. Article I, Section 7 14

Family Code, § 270 2, 23

Family Code § 271 (a) 13

Family Code, § 271 2, 13, 21, 23

Family Code § 3004 3, 23

Family Code, § 3010	3, 23, 28
Family Code, § 3020	23, 28
Family Code, § 3020 (b)	3
Family Code, § 3040	23, 28
Code of Civil Procedure § 908	16
Code of Civil Procedure § 917.1	16

OTHER

Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases* 21 J. Fam. L. 703, 715-21 (1983) 24

OPINION BELOW

The findings of the Alameda County Superior trial court and judgment are attached. The denial of the First District Court of Appeal and Petition for Rehearing and California Supreme Court denial of petition for review, filed July 26, 2006, are also attached.

STATEMENT OF JURISDICTION

Opinions and Orders of Lower Courts and Basis for Jurisdiction

The ruling from which relief is sought is the opinion of the California Court of Appeal, First Appellate District, Division One, issued May 9, 2005,[1] dismissing Petitioner's Appeal prior to briefs being filed and which also affirmed the ruling/statement of decisions of the Alameda County Superior Court issued July 29, 2005 and December 30, 2005.[2] The rulings were not published. Petitioner's petition for rehearing in the Court of Appeal was denied in the June 8, 2006 order.[3] Petitioner petitioned for review by the California Supreme Court which was denied July 26, 2006.[4]

Petitioner brings this petition pursuant to 28 U.S.C. § 1257. The constitutional provision under which relief is sought is the Fifth and Fourteenth Amendment to the United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deny any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

[1] See Appendix 4
[2] See Appendix 1 and 2
[3] See Appendix 5
[4] See Appendix 6

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V provides:
"No person shall ... be deprived of life, liberty, or property, without due process of law...."

The United States Constitution, Amendment XIV, Section 1 provides:
"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Family Code, § 270 provides:

"If a court orders a party to pay attorney's fees or costs under this code, the court shall first determine that the party has or is reasonably likely to have the ability to pay."

California Family Code, § 271 provides:
(a) Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the

party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award.

(b) An award of attorney's fees and costs as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard.

(c) An award of attorney's fees and costs as a sanction pursuant to this section is payable only from the property or income of the party against whom the sanction is imposed, except that the award may be against the sanctioned party's share of the community property.

California Family Code § 3004 provides:

"Joint physical custody" means that **each of the parents shall have significant periods of physical custody**. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents, subject to Sections 3011 and 3020. **(Emphasis Supplied)**

California Family Code, § 3010 provides:

(a) The mother of an unemancipated minor child and the father, if presumed to be the father under Section 7611, are **equally entitled to the custody of the child. (Emphasis Supplied)**

California Family Code, § 3020 (b) provides:

(b) The Legislature finds and declares that it is the **public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage**, or ended their relationship, and to encourage **parents to share the rights and responsibilities of child rearing** in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011. **(Emphasis Supplied)**

STATEMENT OF THE CASE

Lawrence Murray and Michelle Ferreira were married October 25, 1997. They had a son on November 13, 1998, referred to here as "child." Their divorce was filed in August 1999, and on October 10, 2000, they were divorced. It is undisputed that time and again father sought an equal participation in their child's life, seeking a 50/50 timeshare.

It is undisputed that from the outset of the divorce proceedings, Family Court Services, a department of local government, and advisor to the court, told father, and all the men in the mandatory classes, that they are "wasting their time" if they want significant time share for a young child. Repeatedly, mother sought to preclude timeshare with the father commenting in court that "the child belongs with the mother." While both parents were living in San Francisco, and the child was going to school in San Francisco, repeated motions for custody permitted father's timeshare portion to grow to approximately 45%. In summer 2003, with father's consent, mother moved her home to Oakland, but continued to work in San Francisco. The child continued to go to school in San Francisco. In 2003, father asked mother to visit with him at other schools in San Francisco to see which would be best for their continued joint participation in his schooling. Mother refused to even consider schools in San Francisco and would only move her child near her own home. She unilaterally enrolled the child in an Oakland public school, a district in receivership in the State of California. Thereafter began a period of contention between mother and father regarding his participation as a parent in their son's life.

It is undisputed that from the inception of divorce and child custody matters, father was repeatedly told by Family Court Services (Audrey Deloche) to not seek significant

custody of his son and that those state employees discouraged father from exercising his constitutional rights of a parent to participate in the decisions and upbringing of the child, resulting in a chilling effect on those rights.

In late August 1999, at the start of the divorce, mother indicated she was taking "her child" and moving away. In October 1999, the trial court entered an order-prohibiting mother from moving the child out of San Francisco for school or to live. Later, in 2002, father would consent to her moving her home to Oakland, about 25 miles further from his home. Father never consented to mother moving the child's school. When mother unilaterally moved the child's school to Oakland, father objected notifying the school of his lack of consent and with ample time for a decision, sought determination by the court about the location of the school to permit child to continue at a school midpoint between father and mother's home.

However, in the face of an application for an order to shorten time, the hearing was scheduled about 10 days after start of kindergarten. Rather than deal with the urgency of the request, the court instead ordered "mediation," continuing the matter and insuring it could not effectively decide the issue prior to the child gaining "roots" at the new school. On September 13, 2004, father went to mediation as ordered by the court. He prepared documents, maps, and test scores to demonstrate the San Francisco school would allow both parents to participate and that the quality was significantly higher than the Oakland schools which was failing, in receivership, and had a 50 percent drop out rate.

On entering the room, according to the mediator's (Dr David Karp) testimony, the mediator refused to allow father to make any presentation or permit him to speak regarding the comparison of the school systems and distances between

them. Dr. Karp indicated that father was cooperative throughout their 10-minute meeting. Dr. Karp later testified that he never considered the benefits of the child attending the school in San Francisco or consider the impact of such a change. Also, Dr. Karp made his recommendation to the court reducing father's time from about 45 percent to 15 percent. He testified that he sought to encourage (or coerce) cooperation or silence of father, yet he did not consider the degree of cooperation between parents for sharing the child.

Dr. Karp testified he believed father to be competent and had no complaints by mother about father. He had no rational basis to cut father's time by more than half.

Prior to, and at mediation, neither the trial court nor the mediator gave either parent notice that the mediator would make recommendations for custody and that the court would likely adopt them over objection. With no input from father in the mediator's recommendations and no notice that this was the system to be employed, on return to court, a mediator's report surprisingly surfaced which cut Father's time with his child from about 45% to about 15% of timeshare. Also adopted by the court, was the mediator's recommendation to change schools from San Francisco to Oakland, where only mother had easy access to the child.

Trial was held about a year later, after the child was going to the Oakland schools for that time. The court appointed "evaluators" who found that both mother and father were competent parents who both had a strong bond with the child. However, the report did not concern itself considering the father's constitutional rights to participate in the child's upbringing or how it would best be accomplished. The report, and the later testimony, chastised father for repeated motions for more timeshare with the child. Then, without stating the basis for the recommendation, the report

again recommended the majority timeshare with mother, and school near to mother's home.

Upon issuance of the evaluator's recommendations, father sought a trial. Father's main contentions at trial were that the recommendation and process denied him a constitutional right to participate in the child's upbringing, that the best school for both parents to share in the child's upbringing was in San Francisco, and that the recommendations of the mediator and evaluators involved from gender bias and deprived father meaningful participation in the child's life.

At trial, mother put on the testimony of the evaluators who never considered the right of father to participate in the child's upbringing. Though father argued constitutional rights of a parent to participate and presented a "Troxel" analysis, the trial court gave no consideration to father's constitutional rights, the impact on father's ability to participate in the child's upbringing. The trial court did not consider the extent, if any, of any detriment in fashioning orders permitting both parents to coequally participate in the child's upbringing.

At trial, father put on a statistical evidence that in California and nationwide that where timeshare and custody are disputed, mother's win (and fathers lose) 85 to 90 percent of the time. This was the data from the National Institute of Health and the California Judicial Council, the judicial branch of California government. The trial court accepted the statistical imbalance as a fact.

Father argued at trial, (a) the failure and refusal by Dr. Karp, Family Court Services, to permit father to make a presentation, leading to the recommendation to the court, is a violation of the Due Process Clause of the state and federal

Constitutions; (b) Father had a right to notice of what the family court representative was considering in the form of recommendations and an opportunity to make a presentation to a fair and impartial hearing officer prior to the court adopting said recommendations, which was not done. The court fully adopted in its statement of decision the evaluator and mediator reports, which the father contends are improperly biased.[5]

After the father filed a notice of appeal and prior to filing of briefs, the First District Court of Appeal dismissed Petitioner's appeal due to failure to pay sanctions, judgment and attorney fees awarded at the custody trial and modification of support hearing. After taking out a risky loan to pay the aforementioned judgment, fees and sanctions, the Court of appeal denied a petition to reinstate the appeal. The California Supreme Court denied Petition for Review.

---

[5] With the earlier reduction of father's timeshare to 15% based on the mediator's recommendations, the trial court resulting finding after trial, "While the court-appointed evaluators reported that the child's attachments to both parents are thriving, they also observed that his organizing reality is centered in [mother's] sphere..." App. 1: pg. 2, ¶ 3.

The trial court findings after trial that "The child's attachment to father is not dependent, as he claims, on greater geographic proximity between the two of them or on an equal timeshare. The attachment is healthy as things stand, though evaluators expressed concern over the strain to which father's behavior [or making motions to increase his time share] may expose that attachment." App. 1: pg. 2, ¶ 4

And, after having spent four and a half years in school in San Francisco, two years of which were while living in Oakland, without any harm to the child, the trial court found "it would be disruptive to the child's sense of well-being and therefore to his emotional health and development to disrupt his living experience such as by enrolling him in school in San Francisco or by establishing his primary residence in father's home." App. 1: pg. 2, ¶ 3.

PETITION FOR WRIT OF CERTIORARI

Stage of Proceedings When Federal Question Was Raised

1. **Father Raised the Issues of Substantive And Procedural Due Process Rights And Equal Protection Under The Law Being Violated Prior To And During Trial.**

Petitioner attempted to address both substantive and procedural due process claims as well as equal protection based on gender at the trial court level. The court refused to acknowledge such issues as being applicable to the issue of custody and support determination. Petitioner asserted that the principles elucidated in Troxel v. Granville, Stanley v. Illinois, (cited *infra*) and its predecessors stood for the proposition that fit parents were entitled to significantly participate in the care, custody and upbringing of their child in a meaningful way. Custody for the father was being drastically diminished by the court and the court refused to consider that father had any constitutional rights in the case.

2. **Petitioner Intended To Address The Constitutional Violations On Appeal But Was Not Allowed To Proceed On The Merits**

Petitioner filed two Notices of Appeal in the California Court of Appeal, First Appellate District, (A1122695 on child custody and visitation; A 113132 for financial matters) but was not allowed to proceed on the merits and file a brief. That court dismissed the appeal on Respondent's motion. The Court of Appeal never addressed his constitutional concerns, nor were any allowed to be presented to the Court. In both his opposition to the motion to dismiss and petition for rehearing, petitioner addressed the procedural due process concerns involved in dismissal of the appeal on the

grounds of the "disentitlement doctrine." Petitioner's appeal would have addressed the constitutional violations in the court's determinations in the areas of custody, support orders, schooling and sanctions had he been allows to make such a presentation.

3. In Petition For Review To The California State Supreme Court Additional Constitutional Issues Were Raised

In Petitioner's Petition for Review to the California Supreme Court he also addressed the constitutional protections that should be afforded him in presenting his case and appeal and the sanctions imposed on him without due process. He made equal protection arguments regarding the arbitrary distinction between unpaid monetary judgments in his case and other cases. He argued his unpaid sanctions were deemed contemptuous without hearing on contempt or ability to pay. By taking out a loan on his home he made the payment of the trial court order. He argued that he could not have been in flagrant disregard if no attempt to enforce it had ever been made, he was not realistically able to pay such drastic sanctions and other monetary judgments, the trial court had never made any determination of contempt of such orders, and the Appeals Court had never had a hearing on petitioner's ability to pay. Specifically, Petitioner raised the due process concern that the orders on support and sanctions were made in error, in violation of due process rights and that the usage of the disentitlement doctrine allowed the appellate court to dismiss an appeal because of the onerous orders of the trial court. He argued the appeal should be reinstated. This was stated in Petitioner's Petition for Rehearing. Even after full payment, and on no other basis that petitioner "was in flagrant disregard of trial court orders," the appeals were never reinstated and the California

State Supreme Court denied review, without comment. (See Appendices 5 and 6)

REASONS FOR ALLOWANCE OF THE WRIT

I. Petitioner Was Denied His Constitutional Procedural Due Process Rights

A. The California Appeals Courts Denied Petitioner's Due Process Rights Where It Dismissed His Appeal On Custody and Sanctions For Non Payment of Monetary Sanctions, the Very Subject of the Appeal.

The order of dismissal by the state appellate courts were premised on the "disentitlement doctrine," which gives an appellate court discretion to stay or dismiss an appeal where the appellant is "in defiance" of trial court orders. In its opinion, this court has stated that "appellant is in willful violation of several orders to pay attorneys fees and/or costs, as well as, at least, the arrearages based on the retroactive increase in child support from July to December 2005." (Opinion, Appendix 1, p. 3.) The finding of "willfulness" is based upon the trial court's findings covering appellant's income and ability to pay - the same findings which are challenged by appellant. (Appendix 1, pp. 2-3.)

The opinion indicates that an actual judgment of contempt is not required as a prerequisite to this court's exercise of the power to dismiss. (Appendix 1, p. 3.) However, it is clear that what is required is an actual "attitude of contempt to legal orders," which must be more than mere non-compliance due to an inability to comply. (See Appendix 1, p. 3.) The opinion concludes by stating that appellant "should not be permitted to go forward with this appeal <u>while in ongoing defiance</u> of the trial court's

orders." (Appendix 1, p. 3; emphasis added.) This statement is supported by reference to the trial court findings concerning appellant's income and ability to pay (which are disputed by appellant). (Appendix 1, p. 4, footnote 3.)

It is true that California appellate courts have inherent power to dismiss or stay an appeal taken by a party who is in contempt of a trial court order, or who, although not adjudged in contempt, has willfully disobeyed court orders in the action. TMS, Inc. v. Aihara (1999) 71 Cal.App.4th 377, 379. The penalty (called the "disentitlement doctrine") provides that appellate courts are not required to come to the "aid and assistance" of a party who is in "flagrant contempt" of legal orders and processes of the courts. Stone v. Bach (1978) 80 Cal.App.3d 442, 444.

The appellate court may stay the appeal pending the appellant's compliance with the trial court's orders. See Alioto Fish Co., Ltd. v. Alioto (1994) 27 Cal.App.4th 1669) The appellate court may also order the appeal dismissed unless appellant complies with the trial court orders within a specified period of time. Id. at p. 1691.

The use of the disentitlement doctrine in a case such as the instant case, involving nonpayment of monies and in the absence of a determination by a trial of ability to pay, violates Petitioner's right to due process. It deprives him of an appeal on the merits of the very case he is appealing as an error of the trial court. Inability to pay is an affirmative defense to a charge of contempt notwithstanding prior court determination of that subject when setting the original support order. Moss v. Superior Ct. 17 Cal. 4th 396, 426.

An award of fees under California Family Code § 271 (a) is a sanction, and is authorized where an opposing party's conduct has frustrated the policy of the law to promote

settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. Section 271 was the basis for sanctions of $40,000 for having sought the constitutional right to equal participation as a father in his child's life. Additional sanctions, totaling $72,000, were assessed for proceeding to appeal the orders and for father's "erroneous statement of income." No one should be sanctioned for exercise of their constitutional right, here to seek to participate in the child's upbringing. Since the appeals court had not ruled on the Respondent's Motion to Dismiss yet, the trial court granted Respondent attorney fees on appeal under a different statute, based on "financial need" although Petitioner was not in better financial position than Respondent. [6]

Due process requires that a party that may be affected by a proceeding shall have the right to raise such issues or set up any defense, which he or she may have in the cause. Blakeway v. Texas Business Investments Co., 12 Ariz. App. 390 (Div. 1 1970). Appellant has been deprived of his due process rights to such a defense of inability to pay and lack of contempt (or failure to have a hearing on such sanction). The California Courts of Appeal has punished appellant without permitting a trial on the affirmative defense. The Court made finding of contempt and defiance without evidentiary support. The Court of Appeal accepted the order for sanctions as binding destroying the essence of an appeal, a fair look at the proceedings below. Petitioner could not get the court to consider those findings.

Petitioner declared under penalty of perjury on the motion to dismiss and petition for rehearing that he was unable to feasibly pay the amounts ordered by the trial court.

---

[6] See Appendix 3 (Tentative Ruling Adopted by Trial Court granting Respondent mother $12,500 in attorney's fees under Cal. Fam. Code §§ 2030 and 2032.

The trial court took the value of petitioner's home and other property, which Respondent argued was worth two million dollars, and indicated that had funds been invested in the market, Petitioner would have had income. (Requiring that Petitioner have nowhere to live.) The value of six million dollars in his home was a typographical error. Those findings were not tested in a due process hearing.

Procedural due process requires both notice and the opportunity to be heard. The use of the "disentitlement doctrine" to punish appellant for unadjudicated contempt deprived appellant of his right to be heard in violation of the Fourteenth Amendment to the Constitution, which provides that no State shall deprive any person of life, liberty or property without due process of law. (See also, California Const. Article I, Section 7.)

When an enactment broadly and directly impinges upon the fundamental constitutional rights of a substantial portion of those individuals to whom it applies, it can be upheld only if, considering its general and normal application, its compelling justification outweigh its impingement upon constitutional rights and cannot be accomplished by less intrusive means. Lammers v Superior Court (2000) 83 Cal App 4th 1309, 1324-25. The use of unadjudicated contempt as a basis for dismissal of an appeal for nonpayment of monies (without hearing testimony on appellant's affirmative defense of inability to pay) is not due process. Since the application of this doctrine inevitably poses a present total and fatal conflict with applicable constitutional prohibitions to every appellant litigant, such application should be held to violate substantive due process as well. Id.

Moreover, there were less intrusive means of affording constitutional review and compelling payment, even through a loan on his home. The court could have stayed the appeal

pending payment; ordered a conditional dismissal, or even referred the matter back to the trial court for a due process hearing on appellant's affirmative defense of inability to pay. When a rule is onerous or cumbersome, and places burdensome hoops upon any party seeking a meaningful opportunity to be heard before the court, it will be held to violate due process. Id. at p. 1327.

Even if the use of the Disentitlement Doctrine is deemed substantively permissible, and facially constitutional it may have nevertheless been unconstitutional applied as to a specific individual under particular circumstances, depriving that person of a protected right, such a meaningful opportunity to be heard. Id. 1328. Petitioner's interest in having a meaningful hearing and all that right encompasses outweighs any state interest in conserving and allocating finite judicial resources in an efficient and expedient manner. Id. at 1329. The use of the manner of application of the Disentitlement Doctrine in this case, permits a trial court to set an unfair and astronomical order, and in the process prevent any appeal under this doctrine where the amounts are out of bounds with income. No appeal of a wrongful order is permitted.

No demand or failure to pay had ever been documented by opposing counsel or the court. In fact, Petitioner had made every child support payment timely and correctly prior to these orders appealed from. It is clear that the fact that appeal was made of the trial court's orders that the court assumed that appellant would not pay or was in "defiance."

The California Statute have mechanisms for the collection of such judgment, yet none were utilized by Respondent or the Court. Petitioner did not even receive a letter asking for the funds prior to dismissal of the appeal.

The act of simply filing an appeal cannot constitutionally be deemed contempt.

The procedural unfairness of petitioner's summary dismissal for nonpayment creates a situation where the court may chill or prevent a litigant's right to appeal by allowing even a clearly erroneous order to have preclusive effect on any litigant subject to payment of judgment. Essentially, the more erroneous the order, the less appellant will be able to make payment or comply with such an order especially when done in the face of clear factual error in its determination. Exaggerated and unjustified findings of income and ability to pay make it harder to pay than a "less erroneous order." Therefore, an order which the petitioner could never pay in his lifetime (for example a billion dollar monetary sanction) would be dismissed because an appellant could not pay the erroneous order. In this way, California appellate courts by use of the "Disentitlement Doctrine" in such an illogical manner may prevent any litigant from appealing trial court orders, and never reach the merits of the appeal. The California courts of appeal have dismissed the appeal as a result of the error itself, and Petitioner would be able to establish such error if the merits could be reached.

B. Certiorari Should Be Granted On The Ground That The Decision Of Court Of Appeal Has Deprived Appellant Of Equal Protection Of The Procedural Laws

The use of the Disentitlement Doctrine has deprived Appellant of the equal protection of the laws, a right guaranteed by the Fourteenth and Fifth Amendment of the United States Constitution. Civil litigants, who have nether paid a money judgment, nor secured an appeal bond, may nevertheless have their appeals determined on the merits. See California Code of Civil Procedure §§ 908, 917.1. The

Respondent may during the course of the appeal take whatever actions are desired to collect the judgment but the Respondent is not given the windfall of the dismissal.

There is no reasonable basis for treating the unpaid financial obligations any differently in the instant case. Support orders are not stayed unless security is posted, just as for other money judgments. Marriage of Thompson (1979) 96 Cal App 3d 621, 625. Respondent may take all appropriate actions to collect while the appeal is pending.

The Equal Protection Clause requires that rational basis for treating two groups differently. California Assn. of Retail Tobacconists v. State of California, 109 Cal. App. 4th 792, 841-2. (Cal. Ct. App. 2003) In this case there is not reasonable basis to distinguish between types of money judgments. Support judgments were not deemed different from the money judgment when it was determined that the posting of security is necessary to stay such judgments.

This is not a case in which, for example, a party seeks to challenge by appeal a child custody order while depriving the other party of court ordered visitation with the child. It simply not a valid reason to permit dismissal of appeal fro some money judgments and not from others in such an arbitrary and punitive manner.

The absence of protections awarded the defendant in a contempt proceeding militate in favor of a less drastic order than an order of outright dismissal in a case involving mere nonpayment of monies that were never demanded by Respondent. There was never a determination of ability to pay or other contemptuous actions.

Therefore, the distinction between monetary judgment used by the California Courts of Appeal to deprive Petitioner

to an appeal by right, is an artificial one, made to punish Petitioner and to dispose of a case summarily that involves important constitutional concerns.

C. Petitioner Was Denied Procedural Due Process From Early On In the Family Law Proceedings Through the Trial and Post-trial

1. Prior to Trial, Petitioner Was Denied Due Process Rights By The Court and Court Services

As stated above, Petitioner was denied basic fairness, notice and the chance to be heard at numerous stages in the custody, schooling determinations by the court system. These procedural deficiencies denied Petitioner the ability to fairly and fully present his case, including the constitutional and state statutory right to equally participate in his child's upbringing and care.

Early on, Family Curt Services sought to dissuade father from seeking significant custody because he was male, and would need to prove himself, but no such requirements for the mother. Attempts to dissuade father has occurred in just about every step of the proceedings.

Facially, California requires the parents to cooperate and not act unilaterally. The mother violated the rules by making significant decisions regarding the child's schooling against father's wishes with the effect of excluding father. For his part, father agreed to a court order allowing mother moving her residence to Oakland but did not consent to the mother's decision to enroll the child in the Oakland school system pursuant to state directives on the concept of joint parenting.

Father sought immediate review. The matter was effectively tabled for a year, first by mediation, where father

was not permitted to be heard, then by evaluators who fail to even concern themselves with the rights of both parents to participate in the child's upbringing.

Constitutional notions of parent's liberty interest were not respected with a custody reduction 45% to 15% based on biased recommendations, which were adopted. The father objected to this citing consistent bias in the decision making process and a violation of his constitutional rights. He was virtually ignored in the trial court's Statement of Decision. What did flow later were substantial sanctions for his efforts.

2. During Trial, Petitioner Was Denied Procedural Due Process Rights

Due process of law requires that when a parent is facing the loss of custody of his child, he be given an opportunity to cross examine witnesses against him and present witnesses in his own behalf, if he demands such a hearing." California and Federal authority on the question of minimum due process of law in proceedings brought to terminate parental custody address the minimum due process rights of parents faced with potential loss of custody of their children in Santosky v. Kramer, 445 U.S. 745 (1982) and Stanley v. Illinois, 405 U.S. 645 (1972). While the loss of legal custody in a family law proceeding is not as permanent or severe as the complete severance of parental ties, the rights threatened are nonetheless fundamental. Boddie v. Connecticut , 401 U.S. 371, 376 (1971).

As shown by the findings of the trial court, evidence presented by witnesses and statements by the court in the trial transcript, the court dismissed constitutional concerns of the father. The father attempted to show that the Family Code and court's in practice encourage gender preference over constitutional rights.

In its decision trial court ignored the evidence and constitutional concerns that the schools father's had enrolled the child, which would permit both parents participation in the child's life and quality education.

The trial court adopted the mediator's report, overruling father's objections to the fact that the mediator did not meet with him, was dismissive, refused to hear him and gave no notice to the father that he would issue a report to the court and that the court would likely adopt it regarding custody.

The trial court adopted some of the Court Evaluators' report, which sought to diminish father's role because he exercised his right to the court system to resolve the disputes, which he would have waived had he not addressed. There was no explanation in their report to the court why the primary custody was given to the mother, though there was clear evidence to the court that he mother attempted to exclude father from important decisions. The father was satisfied with the nearly 50/50 custody arrangement.

It cannot be ignored that mother claimed at trial that she was home and near the child's school three days a week. The evaluators and trial court found that significant. The father was near the San Francisco school five days a week. The father went through the effort to demonstrate that mother was untruthful, and was home no more than one and a half days a month, through her own time records and bridge receipts, all of that was ignored and father sanctioned in part, $40,000 for demonstration the basis for the award of custody and change of schools was not true. The trial court sanctioned father for the actions of putting on a case (examining witnesses, taking depositions etc.) that he has the right to do. Nothing ~~could have a~~ greater chilling effect on exercise of constitutional rights that to be sanctioned for seeking to enforce those constitutional rights.

3. Post-Trial Awards of Sanctions and Support Against Petitioner Denied Petitioner Father His Due Process Rights

In the Court's findings, the court entirely ignored the fact that in relation to support, the father's financial worth could not be imputed to be 6 million dollars regarding the worth of his house. In the trial court's findings it noted that the acknowledged typographical error of 6 million dollars and imputed reasonable return and imputed income of $385,000.00, annually. Even though Respondent argued that father owned assets in the amount of around two million dollars, the Court held the typographical error against petitioner to punish him by unfairly increasing child support for daring to take the case to trial.

The court also granted Respondent attorney fees pursuant to California Family Code Section 271, without adequate justification. The Family Code Sections allowing for such imposition of sanctions are impermissibly vague and allow the court to deprive the father of property without a full and fair hearing on a number of issues, including ability to pay.

In regard to custody, the court sanctioned and chastised petitioner for challenging recommendation of the evaluator and mediator in regard to depositions and cross-examination as well as documents to prove that the mother's contentions regarding custody were false. The court found sanctionable his exercise of his constitutional right as a parent by taking his son to a school/church event without notifying the mother although the mother had been shown several times to have failed to consider or discussion with father her move of the child's school. See Order after Hearing Page 3 ¶ 6:6-25.

The total sanctions from the trial were awarded in the amount of $60,000.00. Petitioner contends that not only

were the findings after hearing in error legally, but based on animus towards petitioner for challenging the mediator and evaluators as well as asserting his constitutional right to trial to participate in his child's upbringing. The father was sanctioned for going to trial and asking for increased participation in his own son's life and in the process of decisions, the exercise of his constitutional rights.

There was no evaluator statement on why there was such a drastic change in custody or why the mother was allowed to use her unilateral schooling decisions in her favor. The father was sanctioned for demonstrating that the factual basis for the mediator's decision, mother's claim to be home three (3) days a week was a fraud and that mother was home on average only one and a half days per month. The father was sanctioned for threatening the Oakland school system with a lawsuit when the letter written by the father said he only did not consent to his son going to the school. The factual basis for the sanctions was nonexistent.

The trial court then sanctioned Petitioner $12,500.00 for attorney fees for having taken the matter up on appeal. See attached order after trial.

II. Petitioner's Substantive Due Process Rights Were Violated By the Courts Failure to Account for The Liberty Interests Being Deprived

A. Petitioner's Constitutional Right To Participate In The Upbringing Of His Son Was Violated

This Court should grant certiorari because the Constitution and the United States Supreme Court requires that a parent must be given due process of law when a liberty interest is impacted in the manner it is here. As noted

above, the father's procedural due process rights entitle his grievance to be heard in a manner that is fair and just pursuant to procedures, which must provide for such due process rights. California Family Code Sections 270 and 271, also are in conflict with parent's constitutional liberty rights, either on its face or as applied to the father in this case. Both fathers and mothers have equal right to the liberty right to the care custody and upbringing of their natural child under California Family Code Sections 3004, 3010, 3020 and 3040. The trial court and subsequent appellate courts have also denied the father's fundamental liberty rights by unconstitutionally determining the custody modification in violation of father's right to equal protection under the law (based on gender) involving those laws that decide and protect the parent's fundamental liberty rights.

B. Natural Parents Have Certain Liberty Interests In the Care of Their Children That Should Not Be Deprived Without Due Process

By granting certiorari it is likely that this Court will find that the actions and findings taken against the Petitioner's liberty rights were both substantively and procedurally unconstitutional.

This Court has determined that mothers and even unwed fathers have equal rights to the custody of their child. Stanley v. Illinois. This Court has also held that the state cannot infringe by statute on the right of a fit natural parent to that care and upbringing. Troxel v. Granville, 120 S. Ct. 2054 (U.S. 2000).

Additionally, in light of the several decisions involving the right to procedural due process, father was denied his right to fair hearing and review by the courts, due to factors that are also impermissible. The trial court used hearings

that did not allow father to fully present his case and punished him for using his right to examine witnesses and protect his constitutional rights to custody and hearing. He was sanctioned for examining witnesses that the trial court based its decisions on. After support hearing, the court found that father was not forthcoming in his Income and Expense Declaration, when all witnesses testified otherwise and no facts were present that supported its decision. In total, father was ordered to pay mother $72,000.00 following the trial. No facts entitled mother to attorney fees and sanctions the alleged conduct.

The Due Process Clause of the Fourteenth Amendment, like its Fifth Amendment counterpart, guarantees more than fair process; it also includes substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. U.S.C.A. Const.Amends. 5, 14. Troxel v. Granville, 120 S. Ct. 2054 (U.S. 2000). Those rights are inalienable and constant. The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court. See See Meyer v. State of Nebraska, (1923) 262 US 390, 399, 401; [*See, e.g.,* Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases,* 21 J. Fam. L. 703, 715-21 (1983) (study showed that judges prefer mothers as custodians and remained attached to the tender years presumption; a father apparently could win custody only if he could prove the mother unfit)].

The Supreme Court of the United States held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own.") See also, Pierce v. Society of Sisters (1925) 268 U.S. 510, 534-535, holding

that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." Id.

Many other Supreme Court decisions reaffirm such highly protected rights regarding the care, custody and right to direct the upbringing of ones own child. e.g Prince v. Massachusetts (1944), 321 U.S. 158,166); Stanley v. Illinois (1972), 405 U.S. 645, 651, ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'"; Wisconsin v. Yoder (1972), 406 U.S. 205, 232 ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott (1978), 434 U.S. 246, 255, ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Santosky v. Kramer (1982), 455 U.S. 745, 753, (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child"). Troxel reestablishes the litany of Supreme Court case law that reaffirms a parents' fundamental right to make child rearing decisions. See Troxel v. Granville, 530 U.S. 57, 65 (2000).

1. Petitioner Has Had His Constitutional Right To Participate In His Child's Upbringing Violated In The Manner In Which Decisions Were Made Prior To Trial

As discussed above, from the inception of the divorce and child custody matters, the father was repeatedly told by

family court services (Audrey Detouche and Dr. Rublov) to not seek significant custody, thus chilling the father's exercise of constitutional rights of a parent to participate in the decisions and upbringing of the child.

The decisions that were made and actions taken by state officials and the court included decisions and procedures involving the schooling issues, effectively removing any teeth from the attempts to find an agreement to the school, participation in education and upbringing, denying the father timely hearings to frustrate his attempts to get judicial determination before "roots" were established. Even after, the court employed mediators and evaluators that rewarded the mothers refusal to comply with orders and exclude the father from decision making. The court employees overtly denied the father the right to present his case and intentionally failed to notify Petitioner what their role would be in making ultimate decisions in the case and presenting recommendations. The recommendations did not provide reasoned responses to the custody arrangement and drastically reduced the father's timeshare.

The father was denied fundamental fairness and compliance with the states own rules in regard to the judicial determinations of custody, support, schooling and sanctions. This unfairness began early on when the mother moved to Oakland California against the father's objections.

III. The Father Was Denied Equal Protection of the Laws Pertaining to a Fundamental Right of Parenting and Involving Gender Classification

To withstand scrutiny under the Equal Protection Clause, classifications by gender must serve important governmental objectives and must be substantially related to achievement

of those objectives. A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny.

In Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979) (invalidating gender-based distinction in parental rights concerning adoption of illegitimate children), the court specifically rejected the rationale that there is a fundamental difference between maternal and paternal relations, *i.e.*, that a natural mother, absent special circumstances, bears a closer relationship with her child than the father does. Id. at 388-89.

A number of courts have confronted this issue and provided some insight on how these issues may be resolved. The first decision which addressed the constitutionality of applying the best interests of the child standard so as to prefer mothers over fathers was State ex rel. Watts v. Watts, 77 Misc. 2d 178 (N.Y. Misc. 1973), a New York State family court case. The court applied the best interest of the child method as dictated by the custody statute and found that the decision process used by courts in using this method was not gender-neutral. **Even though on its face, the statute was gender-neutral, in practice, application of the statute involved a gender-based decision process. At best, cursory attention was given to the best interest of the child through an examination of various gender-neutral factors.** In the vast majority of the cases, examination of these factors led to a finding that the parents were equally well qualified to be the custodial parent. To make the custody determination, the courts then applied the deciding factor--the tender years presumption. Such a presumption is prohibited by California courts.

The California statutes which encompass custody determinations are not, on their face, in violation of equal protection. In fact, the statute specifically states that father and mother are equally entitled to custody. See California Family Code Sections 3010, 3020 and 3040. However, in practice, and as applied to other aspects of custody trials (and sanctions forgoing to trial) the court employs an entirely different application of those statutes.

The father is entitled to the statutory presumption and to significantly take part in the child's upbringing according to the law. However, the court disregarded the statute and gave drastic and dramatic increase in custody to the mother for reasons unknown. Both parents were found fit and competent to care for the child. The previous split was about 50/50 and diminished significantly because the mother moved away and unilaterally made decisions without the input of the father and over the objections of the father. The mother was rewarded for her actions in diminishing the father's role and the father was sanctioned for fighting for more time and more say in the educational decisions. The evaluators' report gave no reasons for the change in custody but the trial court adopted it over the father's objections. As it pertained to the mediator report, the father's objections regarding notice of recommendation and adoption of the report, were also summarily rejected by the trial court. Dr. Carp, the court's expert did not even consider evidence and facts presented by the father directly bearing on schooling and custody determination, yet the court accepted his testimony carte blanche. At trial, the court accepted findings that mothers were awarded custody in disputed trials more than 85% of the time.

In the present case, the trial court's finding with respect to the issue of joint physical custody is contrary to law. Under California law, Joint physical custody exists where the

child spends **significant time with both parents**. California Family Code § 3004. The division of physical custody in this case was more like the facts in other California cases such as In re Marriage of Whealon, 53 Cal. App. 4th 132 and in In re Selzer (1994) 29 Cal. App. 4th 637, 639, cases in which the fathers had alternate weekends and one weeknight every week, as well as other periods agreeable to the parties. In the latter instances, the courts have held that custody was not joint custody and held that in a situation where a father had about 15% of time with the child that the mother had what was effectively sole physical custody, and father had only liberal visitation rights. Therefore, what the trial court did was fail to abide by constitutional principles or even the statutes that govern custody when denying the father his fundamental liberty rights to the care of his child in favor of a presumption that the mother should have more custody. On appeal, the Petitioner would be able to effectively show this bias and error.

CONCLUSION

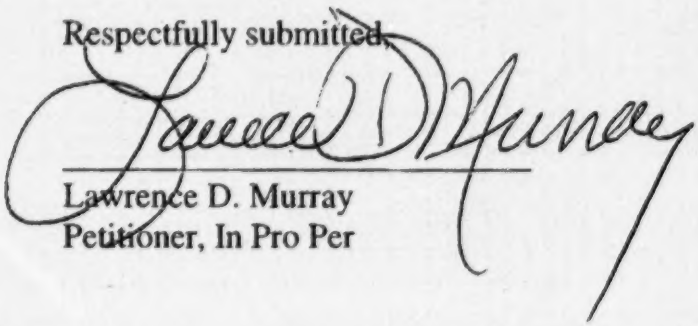
Petitioner respectfully submits that the California Superior Court and later the appellate courts' dismissals refusal to afford him the right to present and submit his constitutional issues and defenses to sanctions, support determinations and custody determinations, and the court's actions which serve to chill the father's exercise of constitutionally protected rights stripped Petitioner of his right to significant participation and physical custody of his son and took away property without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioner requests that this Court issue a writ of certiorari to the California Court of Appeal, First Appellate District, so that the decisions and orders reached as a result of the hearing in the Alameda County Superior Court at

which he was denied due process of law be reversed, and trial orders vacated or, at least, that Petitioner be afforded a hearing on the issue of custody and support and sanctions in the California Court of Appeals, First District.

October 24, 2006

Respectfully submitted,



Lawrence D. Murray
Petitioner, In Pro Per

SUPERIOR COURT, ALLEN E. BROUSSARD
JUSTICE CENTER

COUNTY OF ALAMEDA, STATE OF CALIFORNIA

In Re The Marriage Of	) Case No. C-854525
MICHELLE FERREIRA,	) STATEMENT OF DECISION
Petitioner,	)
and	)
LAWRENCE D. MURRAY,	)
Respondent.	)

FILED
ALAMEDA COUNTY
JUL 29 2005
CLERK OF THE
SUPERIOR COURT
By Carolyn Simpson, Deputy

Respondent's Order to Show Cause re School Attendance, filed July 21, 2004, and his Order to Show Cause re Child Custody and Visitation filed September 15, 2004, came on regularly for hearing before the Hon. Jon S. Tigar, in Department 140 of the above-entitled Court on July 11, 12, and 21, 2005. Christopher F. Emley appeared for and with the Petitioner, Michelle Ferreira. Matthew F. Graham, Constantine Zhukovsky appeared for and with the Respondent, Lawrence D. Murray, who also represented himself. Testimony and documentary evidence was presented, including the report of the custody evaluators appointed by the Court pursuant to Evidence Code §730, and the matter was submitted for decision. Good cause appearing the court now rules as follows:

1. The best interests of Ryan Murray (DOB: 11/13/98) require that his primary residence be in Ferreira's

home, and that he attend school near Ferreira's home, at Montclair Elementary School.

2. The parties reached an agreement more than three years ago, embodied in their Judgment re Reserved Issues, which permitted Ferreira to move her residence to the East Bay. Then and now, the child wakes in Ferreira's home on eight weekday mornings out of ten.

3. While the court-appointed evaluators reported that the child's attachments to both parents are thriving, they also observed that his organizing reality is centered in Ferreira's sphere, where he is observed while with his mother or with his father. Testimony established that from birth, the child has been in the primary care of his mother, where he has flourished. It would be disruptive to the child's sense of well-being, and therefore to his emotional health and development, to disrupt his living experience such as by enrolling him in school in San Francisco or by establishing his primary residence in father's home.

4. The child's attachment to father is not dependent, as he claims, on greater geographic proximity between the two of them or on an equal timeshare. That attachment is healthy as things stand, though both evaluators expressed concern over the strain to which father's behavior may expose that attachment. The evaluators noted that father's fears were not alleviated by physical proximity during the years the child spent in preschool in San Francisco. Ferreira does not undermine the child's attachment to Murray; in fact, the evaluators observed her helping to maintain the father-son connection for the child even in Murray's absence. Murray is not able to provide that beneficial atmosphere to the child, and was seen by the evaluators to become vacant, remote or distant when the

child or others mentioned Ferreira or the child's life with Ferreira; the evaluators expressed concern over the child's reaction and his likely consequent loss of spontaneity. The evaluators testified that these concerns might indicate that Murray's time with the child should be reduced. Ferreira testified that the child had expressed repeated worry over legal topics that she had not raised with him, particularly including which school he would be attending in the coming year.

5. Murray testified that, without notifying Ferreira, he had taken the child to Ecole Notre Dame Des Victoires ("NDV") on seven occasions. Ferreira first learned of these visits to NDV during Murray's testimony at trial.

6. Murray also contacted Montclair Elementary School and threatened them with litigation if they enrolled Ryan in school, because he hoped to enroll Ryan at NDV. He did not notify Ferreira of these threats beforehand. Ferreira then showed up at Montclair with Ryan, where Ryan observed school personnel tell Ferreira that Ryan would not be enrolled at the school. Murray subsequently told Ferreira, and testified in court, that he took these actions because he did not want Ryan enrolled anywhere until the court could make a decision. However, given the then-existing motion schedule, Murray knew that a likely effect of his actions would be to prevent Ryan from attending <u>any</u> school for a substantial period of time, even though the regular school year had started. These actions demonstrate Murray's capacity to place his litigation objectives before Ryan's best interests.

7. The Court finds that Murray has subjected the child to stress in connection with this litigation, and that the

child is managing that stress at some expense to his intimate connection with both parents.

8. The evaluators noted that Murray tended to assign to Ferreira the role of gatekeeper, and to blame her for his feeling excluded from the child's school and social life, but the evidence did not support Murray's view. Once Murray accepted the advise of the court-appointed evaluators to become more actively involved with Montclair Elementary School, his fears that he would not be well received there, or that Ferreira had poisoned the atmosphere there against him, were proved unfounded. Murray's expressed belief that Ferreira was in some way responsible for scheduling birthday parties for the child's classmates on weekends spent with Murray was not reasonable.

9. As noted by the evaluators, the child's needs for the intimacy reciprocity that exists in his mother-son tie outweigh any benefit which might result from attending school closer to his father's office. Murray's own testimony indicated that his work life is busy, and that it takes him out of San Francisco on occasion. Both evaluators testified that their opinions regarding timeshare and school placement would not change even if Ferreira's job required her to be in East Palo Alto five days each week, even if Paul Zamolo were caring for the child five nights each week; the evidence established that Ferreira's work schedule is much more flexible than that, and that Zamolo's evening supervision of the boy occurs far less than Murray believed.

10. The testimony of numerous witnesses, including Murray, established that commuting between Ferreira's home and NDV would be burdensome. Murray reported to the evaluators that the commute was difficult enough to discourage him from participating at Montclair

Elementary School (although, in fact, he has participated frequently and successfully at the school notwithstanding the commute). Murray testified that he explored no schools in the East Bay, even though the child was waking up in Montclair on eight out of every ten school days. The Court concludes that the burden of commuting should fall on the adults rather than on this child.

11. No trustworthy evidence suggests that the child's educational needs are not well served at Montclair Elementary School, where he has adjusted well. He has no special needs which require placement at NDV or any other private school. Although Susie Siegel opined that Montclair Elementary was academically inadequate for this family's goals, her opinion was based on inadequate or outdated information regarding Montclair's performance on standardized tests.

12. The evaluators described this family as involved in recurring litigation, and stressed their worry that continued litigation will likely interfere further with relations between Ferreira and Murray, and with the child's security and healthy development.

WHEREFORE, the Court hereby orders as follows:

1. Ferreira and Murray shall continue to share joint legal custody of Ryan;

2. Until Ferreira and Murray agree otherwise, or until further Order of Court, the said child shall continue to attend Montclair Elementary School;

3. The parties shall share physical custody of Ryan as follows:

a. Each parent shall have Ryan with him or her on alternate weekends, from after school on Friday through return to school on Monday morning when school commences, or during the summer school vacation through delivery to the child's summer activity, or to Ferreira's home at 8:00 AM. During the school year, if Monday is a non-school day, the weekend period of physical custody should extend until return to school on Tuesday morning.

b. Murray shall have the child with him on alternating Tuesdays, from after school or the child's summer activity on Tuesday afternoon until Wednesday morning delivery to school or the summer activity.

c. Each parent shall have the right to take two non-consecutive one-week vacations with the child each year during school vacations, giving each other at least 30 days' written notice, and providing each other an itinerary no later than one week before departure.

d. Ferreira shall have the child with her at other times.

e. Should either parent become aware that he or she will be unavailable to care for the child overnight, he or she shall without unreasonable delay extend to the other parent the first right of refusal to care for the child.

4. The issues of child support and fees are continued for hearing in this Department to September 30, 2005, at 9:00 a.m.

SO ORDERED.

DATED: July 29, 2005

ALAMEDA COUNTY
SUPERIOR COURT

By: Judge Jon S. Tigar

SUPERIOR COURT, ALLEN E. BROUSSARD
JUSTICE CENTER

COUNTY OF ALAMEDA, STATE OF CALIFORNIA

In Re The Marriage Of MICHELLE FERREIRA, Petitioner, and LAWRENCE D. MURRAY, Respondent.	Case No. C-854525 ORDER AFTER HEARING **FILED** ALAMEDA COUNTY DEC 30 2006 CLERK OF THE SUPERIOR COURT By Carolyn Simpson, Deputy

This matter came before the court on October 7, 2005 for hearing on Respondent's Motion to Modify Child Support and for Attorney's Fees and Costs, and Petitioner's Motion for Fees and Costs Pursuant to Family Code section 271. Christopher Emley appeared on behalf of and with the Petitioner. Matthew Graham and Constantine Zhukovsky appeared on behalf of and with the Respondent, who also appeared on his own behalf. Following the hearing, both parties submitted supplementary materials. Having considered the papers filed by the parties, as well as the evidence and argument presented at the hearing, and good cause appearing, the court now orders as follows:

1. Commencing July 6, 2005, Father shall pay guideline child support in the amount of $1,642 and child care add-ons of $288 for a total of $1,930.[1] The court's

[1] The attached dissomaster printout contains an apparent rounding error and misprints the total support as $1,929.

factual findings are as set forth in the attached Dissomaster printout.

2. In making this order, the court has accepted "Calculation B" of Respondent's income put forward by the Petitioner's accountant, although the court believes that Calculation B is a conservative estimate of Respondent's income. For example, the court notes that Respondent's Income & Expense Declaration lists real and personal property of $6,000,000. The court has it within its discretion to impute a reasonable rate of return to these assets for the purpose of setting support. See In re Marriage of Destein (2001) 91 Cal. App. 4th 1385, 1396. Assuming a rate of return of 5 percent, Respondent's assets of $6,000,000 would produce an annual income of $300,000, without even taking into account the earned income that was the subject of the child support motion, although the court finds that Respondent has an earned income in that amount stated.

3. The court does not accept Respondent's contention that his 2004 tax return should be controlling, under the holding of In re Marriage of Loh (2001) 93 Cal. App. 4th 325, 332 ("[a] parent's gross income, as stated under penalty of perjury on recent tax returns, should be presumptively correct"). The court finds that Loh's presumption, that the 2004 tax return is correct, has been rebutted in this case. First Respondent's income for the first six months of 2005 exceeded his total reported income for 2004. Second, the court finds that Respondent's marketing expenses as they pertain to Respondent's boat are expenditures for personal pleasure that are not appropriately deducted from the income available for support. Third, the journals and financial documents of the law firm show that personal expenses are sometimes paid from the law firm. The existence of these facts compels the conclusion that the

2004 tax return is not a reliable indicator of Respondent's income.

4. Respondent's requests for reimbursement of $40,000 in attorney's fees, $4,400 for an evaluation payment to Dr. French, $800 for rent, $785 for an application fee to Notre Dame de Victoire school, and $9755 for tuition to Notre Dame, are denied. Respondent failed to meet his burden of demonstrating that Petitioner should be responsible for these sums as a matter of fact or equity. Respondent's request for reimbursement of school expenses is specifically denied on the ground that the Petitioner did not agree to pay them and they have never been the subject of a court order. The request for reimbursement of attorney's fees is specifically denied on the ground that he waived reimbursement of these expenses in a prior stipulation.

5. Petitioner now requests attorney's fees and costs pursuant to Family Code section 271 in connection with both the child custody litigation that was concluded last summer, and the present motion to modify child support.

6. The court first address the child custody litigation. On the one hand, the court should not deter a parent litigant from fairly challenging the recommendation of a court-appointed evaluator or, for that matter, a court-employee mediator when that parent sincerely believes that a recommendation is not in the best interests of the parties' child. On the other hand, Respondent's conduct here went far beyond any reasonable or measured response to the situation facing him. In the child custody proceeding, Respondent conducted 9 different depositions, including the deposition of wife's former employer (whom he subpoenaed for trial), her boyfriend, one of the principals at her current law firm, her secretary, and a Superior Court mediator

(whose temporary recommendations was not even at issue at the hearing). All of this pretrial discovery required Petitioner's lawyer to appear. Respondent took the parties' son to visit the very private school that was the subject of the litigation without the knowledge or consent of the Petitioner. While Respondent is certainly entitled to assert his procedural rights, the court must also pay heed to the Legislature's expressed policy in family law matters "to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." Fam. Code § 271. Much of Respondent's pre-hearing discovery – such as the deposition of a Family Court Services mediator whose temporary recommendation by definition could not be the basis of the hearing – was irrelevant to the issues before the court and therefore made the litigation unnecessarily expensive. The court therefore orders Respondent to pay $40,000 in fees and costs to Petitioner in connection with the child custody litigation pursuant to Family Code section 271.

7. In the child support motion, the parties were required to spend tens of thousands of dollars to litigate a child support obligation that, at most, will total approximately $24,000 annually. This by itself suggests an inability to implement the policy behind section 271. Moreover, Respondent's position as to his income was without basis. His position as to the credits to which he was entitled was directly contrary to a stipulation he entered in the San Francisco Superior Court. The court therefore orders Respondent to pay an additional $20,000 in fees and costs to Petitioner in connection with the motion to modify child support. The total amount of sanctions order is in the amount of $60,000.

8. Petitioner's claim for prior child care costs is denied.

9. The net of any overpayment or underpayment of child support, and the attorneys fees and costs ordered herein, is due and payable within 45 days of this order.

SO ORDERED.

DATED: December 30, 2005 ALAMEDA COUNTY
SUPERIOR COURT

By: Judge Jon S. Tigar

SUPERIOR COURT, ALLEN E. BROUSSARD
JUSTICE CENTER

COUNTY OF ALAMEDA, STATE OF CALIFORNIA

DATE:	DEPT. 140
HON. JON S. TIGAR, Judge	Carol Simpson, Deputy Clerk

In Re The Marriage Of — Action No. C-854525

MICHELLE FERREIRA, Petitioner

and

LAWRENCE D. MURRAY, Respondent

TENTATIVE RULING

Petitioner's motion for attorneys' fees on appeal pursuant to Fam. Code sections 2030 and 2032 is granted in the amount of $12,500. The court bases this award on the financial circumstances of the parties and assumes, until the matter has been considered by the Court of Appeal, that Respondent's appeal is in good faith. Such amount is payable within 45 days of this order.

DECLARATION OF MAILING AND FACSIMILE TRANSMISSION

I certify that I am not a party to this cause and that on the date stated below I facsimile transmission, a copy of this notice to the persons thereto, addressed as follows:

Christopher Emley	Fax 415 293-9458
Constantine Zhukovsky	Fax 415 704-3383
Matthew Graham	Fax 510 834-9017
Lawrence Murray	Fax 510 834-9017

Executed at Oakland, California on 1/5/2006.

I declare under penalty of perjury that the same is true and correct.

ARTHUR SIMMS; EXECUTIVE OFFICER/CLERK

By: CAROLYN SIMPSON, Deputy

Filed 5/9/06 COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION TWO

In re the Marriage of
MICHELLE FERREIRA and
LAWRENCE D. MURRAY.

FILED
MAY -9 2006
Court of Appeal
First App. Dist
By: DIANA HERBERT
Deputy

MICHELLE FERREIRA,
Respondent,
v.
LAWRENCE D. MURRAY,
Appellant.

A113132

(Alameda County
Super. Ct. No. 854525-9)

Respondent Michelle Ferreira moves this court for an order dismissing the appeal filed by appellant Lawrence D. Murray, on the ground that he "routinely and contumaciously refuses to comply with trial court orders." Because we find that appellant has failed to comply with orders of the trial court, we shall exercise our inherent power to dismiss the appeal.

BACKGROUND

This appeal concerns the trial court's December 30, 2005 order awarding sanctions and modifying child support, and its January 20, 2006 order awarding attorney fees to respondent on appeal. Appellant has also filed a related appeal in the same case (A112265, Super. Ct. Alameda County, No. 854525-9), in which he challenges the trial court's August 22, 2005 order, which modified the custody arrangements for the parties' minor son.

In the December 30, 2005 order, the trial court found that appellant's income is $32,638.00 per month, and ordered him to pay a total of $1,930.00 per month in child support, retroactive to July 6, 2005. In that order, the court also granted respondent's request for $40,000.00 in attorney fees and costs, pursuant to Family Code section 271, due to appellant's conduct during the litigation regarding child custody. This conduct included appellant's having engaged in unnecessary and expensive discovery; which, according to the trial court, "went far beyond any reasonable or measured response to the situation facing him."

The court further ordered, in its December 30, 2005 order, that appellant pay an additional $20,000.00 in fees and costs, under Family Code section 271, in connection with the motion to modify child support, noting, inter alia, that appellant had caused the parties "to spend tens of thousands

of dollars to litigate a child support obligation that, at most, will total approximately $24,000.00 annually."

After appellant filed his appeal in case No. A112265, the trial court also granted respondent's request for attorney fees to defend against the appeal, awarding her an additional $12,500.00 in fees on January 20, 2006.

DISCUSSION

Respondent avers that appellant has paid neither the $72,500.00 in sanctions and fees ordered nor the increased child support ordered to be paid retroactively from July 2005; nor has he posted bond or given any undertaking to stay the orders.[1] Appellant does not dispute respondent's assertion, but instead states, "I simply lack the income to comply with the Court's orders, which I challenge by these appeals."[2]

Appellant thus is in willful violation of several orders to pay attorney fees and/or costs, as well as, at least, the arrearages based on the retroactive increase in child support from July to December 2005. As the appellate court explained in *TMS, Inc.* v. *Aihara* (1999) 71 Cal.App.4th 377, 379: "It is well settled that this court has the inherent power

---

[1] The filing of this appeal does not automatically stay enforcement of any of these orders. (Code Civ. Proc., § 917.1.)

[2] The trial court found that appellant's gross monthly income is $32,638.00. Appellant claims that after expenses and other deductions, his *yearly* income is about $70,000.00.

Respondent also avers that appellant has not paid any of the increased child support. Appellant has provided copies of checks reflecting three payments of the modified amount of $1,930.00 between January and April 2006. Respondent claims she has not yet received any of these payments.

to dismiss an appeal by any party who has refused to comply with orders of the trial court. [Citations.] As the Supreme Court explained in *MacPherson v. MacPherson* [(1939) 13 Cal.2d 271, 277]: 'A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. [Citations.]' No judgment of contempt is required as a prerequisite to our exercising the power to dismiss. [Citations.]" (Accord, *Stone v. Bach* (1978) 80 Cal.App.3d 442, 444 [" 'The rationale upon which [appellate] relief is denied is that it would be a flagrant abuse of the principles of equity and of the due administration of justice to consider the demands of a party who becomes a voluntary actor before a court and seeks its aid while he stands in contempt of its legal orders and processes' "]; see also, e.g., *Kottemann v. Kottemann* (1957) 150 Cal.App.2d 483, 487-488 [appeal dismissed where husband failed to pay alimony as ordered in interlocutory judgment of divorce].)

We conclude that appellant should not be permitted to go forward with this appeal while in ongoing defiance of the trial court's orders.[3] Accordingly, we shall dismiss the appeal.

DISPOSITION

---

[3] Appellant claims that his asserted inability to pay the sanctions shows that he is not in defiance of the court's orders. However, the trial court found otherwise with respect to appellant's income and ability to pay, and appellant has not shown that he has made any effort to pay the sanctions and attorney fee awards of $72,500.00, or that he has posted a bond or given an undertaking to stay the orders pending appeal.

The appeal is dismissed. Respondent is awarded her costs on appeal.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.

A113132, In re Marriage of Ferreira and Murray

COPY

COURT OF APPEAL, FIRST APPELLAT DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 2

MICHELLE FERREIRA,
Plaintiff and Respondent,
v.
LAWRENCE D. MURRAY,
Defendant and Respondent.

FILED
JUN -8 2006
COURT OF APPEAL –
FIRST APP. DIST.
By DIANA HERBERT
Deputy

A112265 / A113132
Alameda County No. 8545259

BY THE COURT:

The petition for rehearing is denied. Appellant's motion to vacate the order of dismissal and to stay the issuance of the remittitur is denied.

Date: Jun -8 2006

KLINE, P.J. P.J.

Court of Appeal, First Appellate District,
Div. 2 – No. A112265
S144498

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re the Marriage of
MICHELLE FERREIRA and
LAWRENCE D. MURRAY.

MICHELLE FERREIRA, Respondent,

v.

LAWRENCE D. MURRAY, Appellant.

Petition for review DENIED.

SUPREME COURT
FILED
JUL 26 2005

Frederick K Olrich
Deputy

GEORGE
Chief Justice